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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 861

SAM WILNER, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF MEYER WILNER, DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 14, 1934.

CERTIORARI GRANTED APRIL 9, 1934

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 14, 1934.

—4858-C

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable John P. Barnes, District Judge of the United States for the Northern District of Illinois on 12th day of July, in the year of our Lord one thousand nine hundred and Thirty-Three, being one of the days of the regular July Term of said Court, begun Monday, the Third day of July, and of our Independence the 158th year.

Present:

Honorable John P. Barnes.

H. C. W. Laubenheimer, U. S. Marshal.

Charles M. Bates, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner, Deceased,
vs.
United States of America.
} No. 42049.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Petition in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 28th day of April, 1933.

3 IN THE DISTRICT COURT OF THE UNITED STATES,

* * (Caption) * *

PETITION—Filed April 28, 1933.

To the District Court of the United States, for the Northern District of Illinois, Eastern Division:

The plaintiff complains of the above named defendant and for cause of action alleges:

1. That the plaintiff is a citizen of the United States of America and a resident of the said Northern District of Illinois, Eastern Division; that one Meyer Wilner died intestate on the 15th day of May, A. D. 1929, a resident of the City of Chicago, in the County of Cook and State of Illinois; that on the 20th day of May, A. D. 1929, the plaintiff was duly appointed administrator of the estate of said Meyer Wilner, deceased, and letters of administration were issued to him as such by the Probate Court of Cook County, Illinois, and he duly qualified as such administrator, and he brings into the court here the letters of administration

so granted to him, which gives sufficient evidence to the court here of the said grant of administration; that the said Meyer Wilner enlisted for military service in the United States Army on the 19th day of September, A. D. 1917, and was given an honorable discharge therefrom on the 31st day of March, A. D. 1919; and the plaintiff is
4 now a resident of Chicago, Illinois;

2. That while in active service under said enlistment, the said Meyer Wilner made application for a policy of War Risk Insurance in his behalf and said application was accepted by the defendant and a policy or certificate of War Risk Insurance was issued thereon, as the plaintiff is informed and believes, in the amount of Ten Thousand Dollars, and thereafter there was deducted from the monthly pay of the said Meyer Wilner from time to time the usual premiums, to-wit: Six Dollars and Seventy Cents per month in full payment of the money due from the said Meyer Wilner under the terms of the said policy or certificate, by the terms of which policy or certificate the defendant agreed to pay to the said Meyer Wilner the sum of, to-wit: Fifty-seven Dollars and Fifty Cents per month in the event of permanent total disability incurred during the life of the said insurance contract and in the event of his death while such disability continued to exist and before a total of two hundred forty of such monthly installments last mentioned had become due and payable, then to pay to his brother, the plaintiff Sam Wilner, in his own right, as beneficiary, the portion of such total of two hundred forty of such monthly installments last mentioned that had not become due and payable during the lifetime of the said Meyer Wilner; which policy or certificate is not in the possession of the plaintiff and the plaintiff upon diligent search and inquiry has been unable to find the same, and the plaintiff is unable to set forth any further particulars as to the contents thereof, but the same, or a copy thereof, is in the possession of the defendant, and the contents thereof are well known to the defendant;

3. That during the life of the said insurance contract and while the said Meyer Wilner was in the military service of the United States as aforesaid, the said Meyer Wil-

ner became totally and permanently disabled as a result of the following diseases, ailments and injuries, to-wit: Shrapnel wound in left leg; loss of left leg; gunshot wound in left side; gunshot wound in left hand; gunshot wound in abdomen; gunshot wound in left writ; general weakness; and general disability;

4. That by reason of the matters and things aforesaid, the said Meyer Wilner became and was totally and permanently disabled on, to-wit: the 15th day of April, A. D. 1919, and became entitled to receive from the defendant under the terms of the said contract of insurance, the sum of Fifty-seven Dollars and Fifty Cents per months for each month thereafter during his lifetime, and the plaintiff Sam Wilner in his own right as beneficiary became entitled to receive from the defendant under the terms of the said contract of insurance, two hundred forty monthly installments of Fifty-seven Dollars and Fifty Cents each, less the number thereof that so became due and payable during the lifetime of the said Meyer Wilner, and the plaintiff Sam Wilner as Administrator of the Estate of Meyer Wilner, deceased, became entitled to receive from the defendant under the terms of the said contract of insurance, the said installments of Fifty-seven Dollars and Fifty Cents each that so became due and payable to the said Meyer Wilner in his lifetime;

5. That the said Meyer Wilner made due proof of said disability to the defendant and demanded payment of the aforesaid amounts, and the plaintiff made due proof of said disability and death to the defendant and demanded payment of the aforesaid amounts, but that the defendant and its agent, the United States Veterans' Bureau, the Veterans Administration and the Administrator of Veterans Affairs allowed said claims to go for an unreasonable time after the making of the same to the said United States Veterans' Bureau, to-wit: from the 13th day of November, A. D. 1928, as to the said claim of the said Meyer Wilner, and from the 17th day of May, A. D. 1929, as to the said claim of the plaintiff, to the 7th day of April, A. D. 1933, without an ultimate decision thereon; nevertheless, the said defendant and its said agent, the Administrator of Veterans Affairs, have disagreed with the plain-

tiff as to his claim for said insurance money and
6 have wholly failed and refused to pay said sums of money, or either thereof, or any part thereof; that on, to-wit: the 22nd day of March, A. D. 1933, the plaintiff wrote to the said Administrator of Veterans Affairs and demanded a final decision on appeal on said claim and thereafter the said Administrator of Veterans Affairs, on, to-wit: the 7th day of April, A. D. 1933, acting through J. O'C. Roberts, solicitor for the Veterans Administration, his duly authorized representative in that behalf, notified the plaintiff in writing that in view of Section 17 of an Act to Maintain the Credit of the United States Government, Public No. 2, Seventy-third Congress, approved by the President at noon on March 20, 1933, the Administration was without authority to take any action on said claim, which written notification was signed "For the Administrator, J. O'C. Roberts, Solicitor," and thereby the said Administrator of Veterans Affairs denied the plaintiff's said claim and caused a disagreement to exist between the said plaintiff and the said Administrator of Veterans Affairs with respect thereto;

6. And the plaintiff further alleges that the said Act to Maintain the Credit of the United States Government, and especially the portions thereof which purport to affect the said claim of the plaintiff, is and are unconstitutional, null and void for the reason that the same attempts to delegate to an executive official legislative powers, contrary to Section 1 of Article I of the Constitution of the United States, providing that all legislative powers in said Constitution granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives, and for the further reason that in taking away from the plaintiff his rights under the said contract of insurance first hereinbefore mentioned, in order to maintain the credit of the United States Government, without making any compensation to the plaintiff therefor, the said Act to Maintain the Credit of the United States Government and the said portions thereof hereinbefore
7 referred to, deprives the plaintiff of property without due process of law and takes from the plaintiff his private property for public use without just compensation,

contrary to the provisions of Article V of the Amendments to the Constitution of the United States, providing that no person shall be deprived of property without due process of law, nor shall private property be taken for public use, without just compensation.

Wherefore, the plaintiff prays judgment against the defendant in the sum of Seven Thousand Four Hundred Seventy-five Dollars in favor of the plaintiff as Administrator as aforesaid, being the amount so due at Fifty-seven Dollars and Fifty Cents per month from the 15th day of April, A. D. 1919, to the 4th day of May, A. D. 1929, inclusive, and in the further sum of Two Thousand Seven Hundred Two Dollars and Fifty Cents in favor of the plaintiff in his own right, being the amount so due at Fifty-seven Dollars and Fifty Cents per month since the death of the said Meyer Wilner, and for the sum of Fifty-seven Dollars and Fifty Cents per month for each and every month thereafter until there has been paid to the plaintiff in his own right a total of one hundred ten of said monthly installments in addition to the money so due him as such administrator.

SAM WILNER,
In his own right and as Administrator of the Estate of Meyer Wilner, deceased, Plaintiff.

EDWARD H. S. MARTIN,
Attorney for Plaintiff.

State of Illinois } ss.
County of Cook }

SAM WILNER, being first duly sworn, on his oath says that he is the plaintiff whose name is subscribed to the foregoing petition; that he has read the same and knows the contents thereof; that the matters and things therein stated are true in substance and in fact; and further affiant sayeth not.

SAM WILNER.

Subscribed and sworn to before me this 26th day of April, A. D. 1933.

DENNIS F. PARSONS,
Notary Public.

(Notarial Seal)

7½ And on, to wit, the 9th day of May, 1933, came the Defendant by its attorney and filed in the Clerk's office of said Court a certain Demurrer in words and figures following, to wit:

8 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA,

(Caption)

DEMURRER—Filed May 9, 1933.

And the defendant, United States of America, by Dwight H. Green, its attorney for the Northern District of Illinois, comes and defends, etc., when, etc., and says that the petition, and each and every allegation thereof and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain his action aforesaid, and that it, the defendant, is not bound by law to answer the same; and this it is ready to verify.

Wherefore, for want of authority in law the defendant prays judgment and that the plaintiff may be barred from maintaining the aforesaid action.

DWIGHT H. GREEN,
United States Attorney.

State of Illinois }
County of Cook } ss.

FRANCIS J. KENNEDY, being first duly sworn upon his oath deposes and says that he is an Assistant United States Attorney assigned to the Northern District of Illinois, Eastern Division; that he is one of the attorneys for the defendant in the above entitled cause; that he verily believes that the foregoing Demurrer is well-founded in point of law and is not interposed for the purpose of delay.

FRANCIS J. KENNEDY.

Subscribed and sworn to before me this ..... day of May, A. D. 1933.

.....
Notary Public.

8½ And on to wit, the 10th day of July, 1933 being one of the days of the regular July term of said Court in the record of proceedings thereof, in said entitled cause before Honorable John P. Barnes, District Judge, appears the following entry, to wit:

9 IN THE DISTRICT COURT OF THE UNITED STATES,

* * (Caption) * *

MEMORANDUM—Filed July 10, 1933.

This cause comes on to be heard upon the demurrer of the defendant to plaintiff's petition.

The petition alleges that the plaintiff is, and that his decedent was, a resident of this district; that plaintiff's decedent enlisted for miliary service on September 19, 1917, and was discharged on March 31, 1919; that plaintiff's decedent, while in active service, made application for a policy of war risk insurance, and that a policy of war risk insurance was issued to him in the amount of $10,000; that while said contract of insurance was in force, and while plaintiff's decedent was in the miliary service, plaintiff's decedent became permanently and totally disabled on August 4, 1918; that plaintiff's decedent made proof of said disability and demanded payment of installments under the insurance contract, but that the defendant and its agent, the United States Veterans Bureau, the Veterans Administration and the Administrator of Veterans Affairs, allowed said claims to go for an unreasonable time after the making of the same to the United States Veterans Bureau, to-wit, from November 15, 1928, as to the claim of plaintiff's decedent, and from May 17, 1929, as to plaintiff's claim, to April 7, 1933, without an ultimate decision thereon, but, nevertheless the defendant and its agent, the Administrator of Veterans Affairs, have disagreed with the plaintiff; that the Act of Congress of the United States, entitled "An Act to Maintain the Credit of the United States Government," approved March 20, 1933, is uncon-

stitutional, for the reason that it attempts to delegate
10 to an executive legislative powers, contrary to Section 1 of Article I of the Constitution, and for the further reason that it takes away from the plaintiff his rights under the said contract of insurance in order to maintain the credit of the United States, without making any compensation, and deprives the plaintiff of property without due process of law, and takes from the plaintiff his private property for public use without just compensation, contrary to the provisions of Article V of the amendments to the Constitution.

As the court views this case, it is unnecessary to consider a number of the questions raised and argued by counsel.

Jurisdiction was conferred upon this court to entertain an action on a policy of war risk insurance in the event of disagreement as to a claim thereon between the Bureau and any beneficiary or beneficiaries thereunder on October 6, 1917 (40 U. S. Stats. L., p. 410). That jurisdiction has been confirmed and continued by various amendments, which have been adopted and approved from time to time since, until on March 20, 1933, there was approved by the President of the United States an act entitled "An Act to maintain the credit of the United States Government," wherein it is provided:

> "SEC. 17. * * * and all laws granting or pertaining to yearly renewable term insurance are hereby repealed, * * *. That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: * * *."

The action at bar was commenced on April 28, 1933. Accordingly, at the time this action was started, the jurisdiction of this court to adjudicate on claims of "yearly renewable term insurance" (and such is the insurance in

question in the case at bar) had ceased to exist, assuming, of course, that the Act of March 20, 1933, is not unconstitutional.

11 Counsel for plaintiff argues that the act is unconstitutional because it delegates to the executive legislative powers. The court is not persuaded that the act is unconstitutional on this ground, and therefore holds that, so far as this point is concerned, it is constitutional.

Perhaps that is all that is necessary to be said. The jurisdiction of this court which formerly existed has ceased to exist. But the court is impelled to make the following observations.

The plaintiff is, and his decedent was, a resident of the State of Illinois. Prior to May 29, 1928, there was no applicable Federal statute of limitations. *Sligh* v. *U. S.*, 277 U. S. 582. Accordingly, the statute of limitations of the State of Illinois was applicable to the cause of action of plaintiff and of plaintiff's decedent. The cause of action being one on a written contract, the Illinois statute required that the action be commenced thereon within ten years next after the cause of action accrued. The petition alleges that plaintiff's decedent became totally and permanently disabled on August 4, 1918. Accordingly, the cause of action arose on that date. (*U. S.* v. *Sligh* (C. C. A. 9), 24 Fed. (2d) 636). The petition does not allege when plaintiff's decedent made proof of his disability, or when the plaintiff made proof of said disability, but does allege that the defendant and its agencies delayed for an unreasonable time in passing upon said claims, to-wit, from November 15, 1928, as to the claim of plaintiff's decedent; and from May 17, 1929, as to the claim of plaintiff. The petition being most strongly construed against the pleader, it will be assumed that plaintiff's decedent did not make claim until November 15, 1928, and plaintiff did not make claim until May 17, 1929,—in each case more than ten years after the cause of action arose.

12 The first applicable Federal statute of limitations was approved May 29, 1928. It provided that (45 U. S. Stats. L., p. 964):

"No suit shall be allowed under this section unless the same shall have been brought within six years

after the right accrued for which the claim is made, or within one year from the date of the approval of this amendatory Act, whichever is the later date: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * * * * * No State or other statute of limitations shall be applicable to suits filed under this section."

By an act approved July 3, 1930, the Federal statute of limitations was amended to read as follows: (46 U. S. Stats. L., p. 992):

"No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director." * * * No State or other statute of limitations shall be applicable to suits filed under this section."

These provisions have, however, been repealed by the act of March 20, 1933.

The court is familiar with the doctrine that the power to enact statutes of limitation is subject to the fundamental condition that a reasonable time shall be allowed for the exercise of the right of action, whether existing or prospective, after it comes within the prospective or present operation of the statute and before the bar becomes effective,

but the court is of the opinion that if the Act of March 20, 1933, be regarded only as an act repealing a statute of limitations favorable to the plaintiff, yet the foregoing general principle has no application, and should not have application, for the reason that the cause of action was barred under the then applicable statute of limitations (that of Illinois) before the statute of limitations more favorable to the plaintiff became the law of the land.

13 The court has not considered, and, as above indicated, has not found it necessary to consider, the question as to whether or not the plaintiff has a contract or a right, as distinguished from a remedy.

For the reasons above indicated, the defendant's demurrer will be sustained.

The court has been helped in arriving at the conclusions above expressed by the opinion of Judge Taylor, in the case of *Grubb* v. *U. S.*, in the District Court of the United States for the Eastern District of Tennessee, filed May 23, 1933.

Appropriate orders may be made at the opening of court on Wednesday, July 12, 1933, without any other or further notice than this.

BARNES
Judge.

14 And afterwards, to wit, on the 12th day of July, 1933, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

Wednesday, July 12, 1933.

Present: Honorable John P. Barnes, Judge of said Court.

On motion of plaintiff's attorney

It Is Ordered that leave be and the same is hereby given the plaintiff to amend instanter the petition on its face; demurrer of defendant to stand as demurrer to petition as

amended, thereupon this cause coming on to be heard upon the defendant's demurrer to the petitioner's petition as amended after arguments of counsel and due deliberation by the Court said demurrer is sustained, whereupon, the plaintiff elects to stand by his petition as amended, whereupon, it is ordered by the Court that this suit be and the same is hereby dismissed for want of jurisdiction at plaintiff's costs, therefore, it is considered by the Court that the defendant do have and recover of and from the petitioner its costs and charges in this behalf expended to be paid in due course of administration to which ruling of the Court the petitioner by his attorney duly excepts.

16 And on, to wit, the 13th day of July, 1933, came the Plaintiff by his attorney and filed in the Clerk's office of said Court a certain Petition for Appeal in words and figures following, to wit:

17 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption)

PETITION FOR APPEAL—Filed July 13, 1933.

To the Honorable John P. Barnes, Judge of Said Court:

And now comes Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner, deceased, the plaintiff in the above entitled cause, by Edward H. S. Martin, his attorney, and feeling himself aggrieved by the final judgment of this court entered against him in favor of the United States of America, defendant, dismissing the said suit for want of jurisdiction on the 12th day of July, A. D. 1933, hereby prays that an appeal may be allowed to him therefrom to the United States Circuit Court of Appeals for the Seventh Circuit, and in connection with his petition herewith presents his assignment of errors.

And the said plaintiff further prays that he may be allowed to prosecute the said appeal in forma pauperis for the reasons set forth in the affidavit herewith submitted.

EDWARD H. S. MARTIN,
Attorney for Plaintiff.

18 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption)

State of Illinois }
County of Cook } ss.

SAM WILNER, being first duly sworn, on his oath says that he is a citizen of the United States of America; that he is the plaintiff in the above entitled cause and the appellant mentioned in the foregoing petition for appeal and in the assignment of errors herewith submitted; that this affiant is not now employed and is unable to obtain employment and is able to exist only with the aid of relief furnished by the Illinois Emergency Relief Fund, as a matter of charity; that the only asset of the estate of said deceased is the cause of action involved in the above entitled cause; that the said Meyer Wilner, deceased, died intestate and this affiant and all of the heirs-at-law of said Meyer Wilner, deceased, have no money or property except necessary wearing apparel and necessary household goods; that because of their poverty and the absence of assets of said estate and the fact that this affiant and the said heirs-at-law have no money or property upon which money can be raised, this affiant and the said heirs-at-law are unable to pay the costs of such appeal or to give security for the same and that he verily believes he is entitled to the redress he seeks by such appeal, for the reasons set forth in the assignment of errors herewith submitted,
19 and therefore prays that he may be given leave to prosecute such appeal without the payment of costs or giving of security therefor; and further affiant sayeth not.

SAM WILNER.

Subscribed and sworn to before me this 13th day of July, A. D. 1933.

DENNIS F. PARSONS,
Notary Public.

(Notarial Seal)

20 And on, to wit, the 13th day of July, 1933, came the Plaintiff by his attorney and filed in the Clerk's office of said Court a certain Assignment of Errors in words and figures following, to wit:

21 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption)

ASSIGNMENT OF ERRORS—Filed July 13, 1933.

And now comes the appellant, Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner, deceased, by Edward H. S. Martin, his attorney, and in connection with his petition for an appeal in the above entitled cause, says that in the record and proceedings and in the final judgment aforesaid, manifest error has intervened to the prejudice of the appellant, to-wit:

1. The said District Court error in sustaining the demurrer to the petition in the above entitled cause.
2. The said District Court erred in dismissing the said suit for want of jurisdiction.
3. The judgment of said District Court dismissing the said suit is contrary to law.
4. The said District Court erred in awarding costs against the plaintiff.

By Reason Whereof, the appellant prays that the judgment aforesaid may be reversed.

EDWARD H. S. MARTIN,
Attorney for Plaintiff.

22 And on to wit, the 13th day of July, 1933 being one of the days of the regular July term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

23 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

It Is Hereby Ordered that the plaintiff be, and hereby is, allowed an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the final judgment entered on the 12th day of July, A. D. 1933, in this cause and that he be, and hereby is, given leave to prosecute such appeal without the payment of costs or giving security therefor.

BARNES,
District Judge.

24 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

STIPULATION AS TO TRANSCRIPT.

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled cause that the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in making up the transcript of the record to be submitted to the United States Circuit Court of Appeals for the Seventh Circuit on appeal in said cause, may include in such transcript the following records and files in said cause, using originals where permitted by law and copies otherwise, to-wit:

1. The plaintiff's petition filed in said cause.
2. The defendant's demurrer thereto.
3. The opinion of the court on said demurrer.
4. The final judgment in said cause and all orders entered July 12, 1933.
5. The plaintiff's petition for appeal and affidavit attached thereto.
6. The assignment of errors.
7. The order allowing an appeal.

8. This stipulation.
9. The citation and proof of service thereof.

Dated July 13, 1933.

EDWARD H. S. MARTIN,
Attorney for Plaintiff.
DWIGHT H. GREEN,
by FJK
United States Attorney,
Attorney for Appellee.

25 Northern District of Illinois } ss:
Eastern Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner, deceased *vs.* United States of America No. 42049 as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 14th day of July, A. D. 1933.

CHARLES M. BATES,
Clerk.

(Seal)

26 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption)

CITATION—Filed July 13, 1933.

To United States of America—Greeting:

You Are Hereby Cited and Admonished to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, Illinois, thirty days

from and after the day this citation bears date, pursuant to an order allowing an appeal filed and entered in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, from the final judgment filed and entered on the 12th day of July, A. D. 1933, in that certain suit, being No. 42049, wherein Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner, deceased, is plaintiff and United States of America is defendant, and wherein the said plaintiff is appellant and you, the said United States of America, is appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said order allowing said appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness, the Honorable John P. Barnes, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, this 13th day of July, in the year of our Lord One Thousand Nine Hundred and Thirty-three.

JOHN P. BARNES,
Judge.

27 United States of America
Northern District of Illinois } ss.
Eastern Division

Due service of the foregoing citation upon United States of America, appellee, is hereby acknowledged this 13th day of July, A. D. 1933.

DWIGHT H. GREEN,
Per F. J. K.
United States Attorney, Attorney for Appellee.

(File endorsement omitted.)

28 UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 18, inclusive, contain a true copy of the transcript of record of the District Court of the United States for the Northern District of Illinois, Eastern Division, filed in this Court on August 8, 1933, on which the following entitled cause was heard and determined:

Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner,

Appellant,

vs.

The United States of America,

Appellee,

No. 4898, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 1st day of March, A. D. 1934.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

29 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit on the third day of October, 1933, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-Three, and of our Independence the One Hundred and Fifty-Eighth.

Sam Wilner, In his own right, and as Administrator of the Estate of Meyer Wilner, Deceased,
5050 *vs.*
The United States of America

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And afterwards, to-wit: On the twelfth day of January, 1934, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to-wit:

30-32 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption) * *

OPINION—Filed January 12, 1934.

Before ALSCHULER, SPARKS, and FITZHENRY, *Circuit Judges.*

FITZHENRY, *Circuit Judge.* This is an appeal from a judgment dismissing appellant's suit for want of jurisdiction and for costs, upon sustaining appellee's demurrer to appellant's petition. Suit was brought April 28, 1933, under an alleged disagreement on April 7, 1933, with the Administrator of Veterans Affairs, to recover permanent disability and death benefits under a War Risk Insurance Certificate issued to the soldier Meyer Wilner.

The petition charges that the soldier died intestate May 15, 1929, at Chicago, Cook County, Illinois. Appellant was appointed administrator of his estate May 20, 1929, and qualified. The soldier enlisted in the military service September 19, 1917, and was honorably discharged March 31, 1919; while in the service the insurance policy in question in the sum of $10,000 was granted him; all premiums on it were deducted from the soldier's pay; appellant, a brother, was named as beneficiary. It was also alleged that the soldier became totally and permanently disabled April 15, 1919. Proof of disability was made by the soldier and appellant made due proof of death to appellee and demanded payment. The Veterans Bureau, the Veterans Administration and the Administrator of Veterans Affairs allowed the claim to go for an unreasonable time after making proofs to the Veterans Bureau, to-wit: from November 15, 1928, as to the claim of decedent, and from May 17, 1929, as to the claim of petitioner, to April 17, 1933, without an ultimate decision thereon.

The alleged disagreement is with the Administrator of Veterans Affairs as to appellant's claims, in having wholly failed and refused to pay the said money or any thereof, reciting the particulars as to the denial of said claims, made in writing April 7, 1933, on the purported authority of Section 17 of an Act entitled, "An Act to Maintain the Credit of the United States Government," Public No. 2, 73rd Congress, approved March 20, 1933, charging that thereby a disagreement existed between appellant and the Administrator of Veterans Affairs.

The petition charges that the act referred to is unconstitutional, being an attempt to delegate legislative powers to an executive officer, contrary to Section 1, Article I, of the Constitution; also, for the reason that it amounts to taking from appellant his rights under the contract of insurance without making compensation therefor, and that the act referred to deprives appellant of property without due process of law and takes from him his private property for public use without just compensation, in violation of the 5th Amendment.

The date originally charged when the soldier became totally and permanently disabled was August 18, 1918; by amendment the date was changed to April 15, 1919, which brought the cause of action within the ten year statute of limitations in Illinois.

Appellant has raised many interesting constitutional questions in his arguments and briefs. Section 17 of An Act to

Maintain the Credit of the United States Government (Title 38, § 717, USCA) "repeals all public laws granting * * * compensation and allowances, * * * to veterans and dependents of veterans of * * * the World War * * *."

It also contains the following provision:

> "and all laws granting or pertaining to yearly renewable term insurance are hereby repealed, * * *. The Administrator of Veterans Affairs under the general direction of the President shall immediately cause to be reviewed all allowed claims under the above referred to laws and where a person is found entitled under this chapter, to authorize payment or allowance of benefits in accordance with the provisions of this chapter. * * *"

All cases where suit has been commenced prior to the passage of the act, or where payment has been allowed and commenced, or where a judgment has been rendered by a court of competent jurisdiction on a contract for yearly renewable insurance, or which may hereafter be rendered in any such suit now pending, under contracts for yearly renewable term insurance, are excepted from the operation of the above provisions.

Because the act permits the Administrator to re-examine the cases and to make allowances according to regulations prescribed by the President, it is claimed there is an unwarrantable delegation of legislative power.

The material section, so far as the jurisdiction of this Court is concerned, is Section 5 (Title 38, § 705 USCA), which makes all decisions of the Administrator of Veterans Affairs, under the provisions of the act or regulations issued pursuant thereto, final and conclusive on all questions of law and fact "and no other official or Court of the United States shall have jurisdiction to review by amendment or otherwise any such decision."

The United States Circuit Court of Appeals for the 5th Circuit very recently had almost the precise questions here involved before it in *Margaret Shea Lynch* v. *United States*. In an opinion filed November 3, 1933, (not yet reported) the Court said:

> "We need not discuss in detail the interesting questions raised by appellant. It is elementary that the United States may not be sued without her consent. Section 5 of the Act of March 20, 1933, is broad enough to deprive the District Court of jurisdiction whether vested by the provisions of the Tucker Act (28 USCA 41, par.

20) or under the provisions of the War Risk Insurance Act (38 USCA 445). Conceding that the policy of insurance is a contract, it was subject to any provisions of law subsequently enacted by Congress and appellant's rights were not impaired thereby. *White* v. *United States*, 270 U. S. 175."

We believe the Circuit Court of Appeals reached the proper decision in the Lynch case, *supra*, and that its conclusions are sound. There is no unlawful taking of property without due process of law for the reason there is no vested right conferred upon a beneficiary in a war risk insurance policy. *White* v. *United States*, 270 U. S. 175.

It is well settled that a sovereign may, by legislation, abrogate the right previously granted to sue it. *Munn* v. *Illinois*, 94 U. S. 113; s. c. 69 Ill. 80; *Orr* v. *Allen*, 248 U. S. 35.

Section 17 of the Act of March 20, 1933, deals with claims of the same general character as those which are now cognizable in the United States Court of Claims and the United States Court of Customs Appeals; that is, they are of such a character as the Congress might for consideration and disposition "confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States." *Ex Parte Bakelite Corporation*, 279 U. S. 438; *Williams* v. *United States*, 289 U. S. 553, 579; *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272.

Under these same authorities Section 17 of the Act of March 20, 1933, does not violate Section 1, Article I of the Constitution of the United States as an unwarranted delegation of legislative power to the executive.

For many years following the Civil War and the Mexican War the allowance of pensions was handled entirely by the Congress itself. Many thousands of special acts were passed granting relief to specific veterans or their widows.

In *United States* v. *Ferreira*, 13 How. 40, 48, the United States Supreme Court was referring to an Act of Congress passed in pursuance of a treaty directing that the judges of the territorial courts of Florida should examine and adjudge certain claims against the United States for losses suffered as the result of military operations. The statute gave the right to review to the Secretary of the Treasury. The Court held that the power conferred, although judicial in nature, was nothing more than the power ordinarily given by law to

a commissioner appointed to adjust claims under a treaty, and held that the statute was not unconstitutional because it conferred the power to review upon the Secretary of the Treasury.

In *Williams* v. *United States, supra,* the Supreme Court said:

> "And since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article."

It is clear that when Congress, in the Act of March 20, 1933, with reference to claims of the character here involved, after giving the Administrator of Veterans Affairs the power of final and conclusive decision on all questions of law and fact, said: "And no other official or court of the United States shall have jurisdiction to review by amendment or otherwise any such decision" (§ 5, being Title 38, § 705 USCA), no provision of the Constitution was infringed.

While the Act of March 20, 1933, involves a substantial reversal of policy by the Congress upon the same subject matter, yet the advisability or desirability of such action is a matter that was addressed to the legislative discretion of the Congress and not to the Courts.

Any benefits to which appellant may be entitled under the law are now within the discretion of the President and the Administrator of Veterans Affairs. All jurisdiction to hear and determine such matters has been withdrawn from the Courts of the United States. *Stanley* v. *Schwalby,* 162 U. S. 255; *Eastern Transportation Co.* v. *United States,* 272 U. S. 675; *The Collector* v. *Hubbard,* 12 Wall. 1. In the latter case the Court said:

> "A party cannot have any vested right in a remedy conferred by an act of Congress to prevent Congress from modifying it or adding new conditions to its exercise."

The Court below properly dismissed the suit for want of jurisdiction. It went farther, however, and gave judgment against appellant for costs. It was error to tax costs against appellant, where the Court finds it has no jurisdiction.

Inglee v. *Coolidge*, 2 Wheat. 363; *Mayor* v. *Cooper*, 6 Wall. 247; *Hornthall* v. *Collector*, 9 Wall. 560; *Citizens' Bank of Louisiana* v. *Cannon, Sheriff, et al.*, 164 U. S. 319; *Conley* v. *Ballinger*, 216 U. S. 84, 30 S. Ct. 224.

The judgment will be reversed and the cause remanded, with directions to enter judgment dismissing appellant's petition, without costs.

33 And on the same day, to-wit: On the twelfth day of January, 1934, the following further proceedings were had and entered of record, to-wit:

Friday, January 12, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

(Caption)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to enter judgment dismissing appellant's petition without costs.

34 And afterwards, to-wit: On the nineteenth day of February, 1934, there was filed in the office of the Clerk of this court a stipulated praecipe for record, which said stipulated praecipe for record is in the words and figures following, to-wit:

35 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

(Caption)

STIPULATION—Filed February 19, 1934.

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled cause, that in making up the transcript of the record for use on petition for certiorari in the Supreme Court of the said United States in the above entitled cause, the Clerk of the said United States Circuit Court of Appeals may omit from the transcript of the record of said United States Circuit Court of Appeals in said cause, all matters except the following:

1. Printed transcript of the record of said District Court.
2. Opinion filed January 12, 1934.
3. Judgment entered January 12, 1934, reversing judgment of District Court.
4. This stipulation.

EDWARD H. S. MARTIN,
Attorney for Appellant.
DWIGHT H. GREEN,
United States Attorney, Attorney for Appellee.

Chicago, Illinois,
February 19, 1934.

36 UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 21 to 27, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the stipulated praecipe, filed on the nineteenth day of February, 1934, in the case of

Sam Wilner, In his own right, and as Administrator of the Estate of Meyer Wilner, Deceased,

Appellant,

vs.

The United States of America,

Appellee,

No. 5050, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 1st day of March, A. D. 1934.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 9, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.